Chai Kim Chong v Barnwood Sdn Bhd

HIGH COURT (MIRI) — ORIGINATING SUMMONS NO MR38 OF 1992
RICHARD MALANJUM J
8 FEBRUARY 1994

Land Law — *Restraints on dealings — Caveats — Removal — Whether caveator had caveatable interest — Whether unpaid balance purchase price gave rise to interest in land*

Land Law — *Transfer — Trusts — Purchase price not paid in full — Whether purchaser held land on constructive trust for vendor*

The defendant was the beneficial owner of land by virtue of an agreement with the registered proprietor. A single storey semi-detached dwelling house was constructed on the land by the defendant which was purchased by the plaintiff pursuant to a sale and purchase agreement ('the sale and purchase agreement'). The transfer of the land to the plaintiff was registered on 19 April 1990 upon the plaintiff's undertaking to pay the balance of the purchase price. Subsequently however, the plaintiff refused to pay the balance of the purchase price on the basis that the defendant had not constructed the dwelling house in accordance with the approved plan and specifications. The defendant entered a caveat over the land and later filed an action against the plaintiff.

The plaintiff applied for a removal of the caveat and for compensation on the ground that the defendant had no caveatable interest as the unpaid balance purchase price did not give rise to an interest in the land. The defendant, on the other hand, contended that: (i) the defendant had not wholly divested itself of its interest in the land as it had not been paid the full purchase price; and (ii) the plaintiff held the land on a constructive trust until the balance price was paid in full.

Held, allowing the plaintiff's application:

(1) The balance of the purchase price in a transaction is not sufficient to create a caveatable interest. The owing of the balance of the purchase price was a right in personam against the plaintiff and not a right in rem in relation to the land.

(2) The issue of the plaintiff being a constructive trustee went against the indefeasibility of title provision contained in s 132 of the Sarawak Land Code (Cap 81). The circumstances upon which the land was transferred to the plaintiff and the source of the dispute did not warrant the inference of any trust, constructive or otherwise. Therefore, the caveat should be removed and compensation payable by the defendant assessed. However, the defendant was entitled to pursue its claim in respect of the plaintiff's undertaking.

Per curiam:
The issue of the balance of convenience and prejudice to the caveator in the event the caveat was removed would only arise if the caveator had a caveatable interest in the land.

[Bahasa Malaysia summary

Defendan merupakan tuan punya benefisial sebidang tanah di bawah suatu perjanjian dengan tuan punya berdaftar tanah itu. Sebuah rumah kediaman kembar satu tingkat telah dibina di atas tanah itu oleh defendan dan dibeli oleh plaintif melalui suatu perjanjian jualbeli ('perjanjian jualbeli itu'). Pindahmilik tanah itu kepada plaintif telah didaftarkan pada 19 April 1990 atas akujanji plaintif untuk membayar baki harga belian. Tetapi kemudiannya, plaintif enggan membayar baki harga belian atas alasan bahawa defendan tidak membina rumah kediaman itu mengikut pelan dan tentuan yang diluluskan. Defendan telah memasukkan suatu kaveat ke atas tanah itu dan kemudiannya memfailkan suatu tindakan terhadap plaintif.

Plaintiff telah memohon untuk membatalkan kaveat itu dan untuk pampasan atas dasar bahawa defendan tidak mempunyai kepentingan yang boleh dikaveat kerana baki harga belian itu tidak mewujudkan suatu kepentingan di dalam tanah itu. Defendan sebaliknya, menegaskan bahawa: (i) defendan tidak melucutkan kesemua kepentingannya di dalam tanah itu kerana ia masih belum dibayar harga belian penuh; dan (ii) plaintif memegang tanah itu atas suatu amanah konstruktif sehingga harga belian dibayar sepenuhnya.

Diputuskan, membenarkan permohonan plaintif:

(1) Baki harga belian sesuatu transaksi tidak mencukupi untuk mewujudkan suatu kepentingan yang boleh dikaveat. Hutang baki harga belian itu merupakan suatu hak in personam terhadap plaintif dan bukannya suatu hak in rem di dalam tanah itu.

(2) Isu mengenai plaintif sebagai pemegang amanah konstruktif trustee bertentangan dengan peruntukan mengenai hakmilik tidak boleh sangkal yang terkandung di dalam s 132 Kanun Tanah Sarawak (Bab 81). Keadaan di atas mana tanah itu telah dipindahmilik kepada plaintif dan punca pertikaian itu tidak mewajarkan inferens bahawa sebarang amanah, konstruktif atau selainnya, diwujudkan. Oleh itu, kaveat itu dibatalkan dan pampasan yang perlu dibayar oleh defendan ditaksirkan. Bagaimanapun, defendant berhak meneruskan tuntutannya terhadap akujanji plaintif.

Per curiam:
Isu mengenai imbangan kemudahan dan kemudaratan kepada pengkaveat jika kaveat itu dibatalkan hanya akan timbul jika pengkaveat mempunyai kepentingan yang boleh dikaveat di dalam tanah itu.]

Cases referred to

1 *Eng Mee Yong & Ors v V Letchumanan* [1979] 2 MLJ 212 (folld)
2 *Hew Sook Ying v Hiw Tin Hee* [1992] 2 MLJ 189 (folld)
3 *Kumpulan Sua Betong Sdn Bhd v Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 (folld)
4 *Registrar of Titles, Johore v Temenggong Securities Ltd* [1976] 2 MLJ 44 (folld)
5 *Wong Kuan Tan v Gambut Development Sdn Bhd* [1984] 2 MLJ 113 (folld)
6 *Forward Metal Works Sdn Bhd v Perbadanan Pembangunan Ekonomi Sarawak* (Originating Motion No KG7 of 1988) (unreported) (folld)
7 *Frazer v Walker* [1967] 1 AC 569; [1967] 1 All ER 649; [1967] 2 WLR 411 (refd)
8 *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294 (folld)

Ivan Ong (*Lim Tan & Partners*) for the plaintiff.
David Lim (*Chew, Jugah, Wan Ullok, Goh & Co*) for the defendant.

Cur Adv Vult

Richard Malanjum J: By an originating summons dated 11 August 1992, the plaintiff/caveatee is applying for the following orders:

(1) that the Caveat Instrument No LL6186/1991 lodged against all that parcel of land situate at 0.5km Pujut-Lutong Road, Miri, and described as Lot 1105, Block 6, Miri Concession Land District (hereinafter called 'the subject land') belonging to the plaintiff and registered at the Miri Land Registry Office on 19 October 1991 be removed;
(2) that compensation to be assessed be paid by the defendant to the plaintiff;
(3) costs of and incidental to the application be taxed unless otherwise agreed and to be paid by the defendant to the plaintiff; and
(4) such further or other relief as this honourable court may deem fit.

The main ground of the application is that the defendant/caveator has no caveatable interest as the balance of the purchase price of the subject land does not constitute a caveatable interest.

The defendant on the other hand is resisting the application contending that:

(a) the defendant/caveator has not wholly divested itself of its interest in the subject land to the plaintiff/caveatee as it has not been fully paid the purchase price; and
(b) the plaintiff/caveatee, having acquired the title to the subject land though not having paid in full the purchase price, has become a constructive trustee until such balance price has been fully paid.

Thus, for the above reasons, learned counsel for the defendant/caveator submitted that there was a serious question to be tried and any order to remove the caveat would severely prejudice the defendant/caveator. It was also further submitted that since there existed a charge of the Federal Government on the subject land there would be no urgency for the removal of the caveat and therefore the balance of convenience would be with the defendant/caveator. Learned counsel also brought up the conduct of the plaintiff/caveatee as being inequitable as she had not performed her part of the bargain and had further failed to meet her undertaking given through her former advocates. He ventured to say that if there was no undertaking there would have been no transfer of the subject land.

In view of the contentions of the parties, perhaps it is appropriate to note at this juncture the facts and events leading to the lodgment of the caveat in question.

The defendant/caveator was the beneficial owner of all that parcel of land situate at 0.5km, Pujut/Lutong Road, Miri, Sarawak containing an area of 304.7m^2, more or less, and described as Lot 1105, Block 6, Miri Concession Land District by virtue of an agreement dated 15 July 1988 with one Tiong Kiing Huat, the registered proprietor.

A single storey semi-detached dwelling house was constructed on the subject land by the defendant/caveator which was purchased by the plaintiff/caveatee pursuant to a sale and purchase agreement dated 28 November 1988 (hereinafter called 'the sale and purchase agreement') and exhibited as 'CKC–1' in the affidavit of the plaintiff/caveatee affirmed on 6 August 1992 and filed in support of this application.

The sale and purchase agreement contained several provisions including the mode and time of payments of the purchase price.

On 20 February 1990, the Miri Municipal Council issued the occupation permit for the dwelling house erected on the subject land. But the sum of RM35,000 remained unpaid even to date, being the balance of the purchase price totalling RM92,000. Under item 9 of Sch II of the sale and purchase agreement, the last 5% of the purchase price should have been paid upon issue of the occupation certificate or transfer of the subject land, whichever is the later. In this case, the transfer was registered on 19 April 1990, thereby making the plaintiff/caveatee the registered proprietor of the subject land.

The refusal of the plaintiff/caveatee to pay the balance of the purchase price was on the basis that the defendant/caveator did not construct the dwelling house in accordance with the approved plan and specifications.

Exchanges of correspondence took place in particular between the advocates of the parties. I pause to note here that at least in one letter of the former advocates of the defendant/caveator dated 29 June 1990 (exh CKC–8 of the affidavit of the plaintiff/caveatee affirmed on 6 August 1992), it would appear that the defendant/caveator did not deny outright the allegation of the plaintiff/caveatee. But prior to that on 23 December 1989, the plaintiff/caveatee did sign a letter agreeing to 'take over the completed building' on the subject land (exh FSM–2 of the affidavit in opposition of

Fong Siew Ming affirmed on 28 November 1992). Be that as it may, the advocates of the defendant/caveator on 19 September 1991 gave notice of termination of the sale and purchase agreement to the present advocates of the plaintiff/caveatee. A

On 19 October 1991, the caveat in question was accordingly registered. This was followed by further exchanges of correspondence including a letter dated 11 May 1992 from the advocates of the plaintiff/caveatee (exh CKC–9 of plaintiff's affidavit affirmed on 6 August 1992) demanding removal of the said caveat within seven days from the date thereof. And on 27 May 1992, the defendant/caveator filed an action, Civil Suit No 11 of 1992, against the plaintiff/caveatee. Thereafter nothing much appeared to have happened until this present application on 11 August 1992. B C

As the registered proprietor of the subject land the plaintiff/caveatee can 'rely upon [her] registered title as prima facie evidence of [her] unfettered right to deal with the subject land as [she] pleases; it is for the [defendant] caveator to satisfy the court that there are sufficient grounds in fact and law for continuing in force the caveat' (see *Eng Mee Yong & Ors v V Letchumanan*[1]). D

Currently, the preferred approach in dealing with an application for extension or removal of a caveat has been summarized by his Lordship Mohamed Azmi SCJ in the case of *Hew Sook Ying v Hiw Tin Hee*[2] when he said this at p 197D: E

> ... on an application for extension or to set aside the caveat, it is incumbent on the caveator to satisfy the court that he has such a claim before he proceeds to show that his said claim to title or registrable interest does raise a serious question or issue to be tried, and further on balance of convenience it would be better to maintain the status quo pending the trial of the action.

I interpolate to say that 'a claim' mentioned thereto must necessarily refer to a claim for a 'caveatable interest' a phrase commonly used. (See *Kumpulan Sua Betong v Dataran Segar*.[3]) Anyone who claims an estate or interest in any land may lodge a caveat provided the required formalities are complied with, as the Registrar's function is a ministerial one only. (See *Registrar of Titles, Johore v Temenggong Securities Ltd*.[4]) But whether such a claim can support a caveat is another matter. In short, claiming an interest or estate in any land is one thing but establishing it is another. F G

It is obvious from the statutory declaration of Fong Siew Ming made in support of the caveat in question and from the alternative relief sought for in the above-mentioned civil suit that the primary purpose of the defendant/caveator is to collect the balance of the purchase price of the subject land. H

Our courts however have held that balance of the purchase price in a transaction is not sufficient to create a caveatable interest. In *Wong Kuan Tan v Gambut Development Sdn Bhd*,[5] his Lordship Hashim Yeop A Sani FJ (as he then was) said this at p 116 col 1D–E:

> It is also plain that this was a contractual right applicable only when purchase price is not fully paid. But this alone cannot create a caveatable interest in the land. I

In an unreported case of *Forward Metal Works Sdn Bhd v Perbadanan Pembangunan Ekonomi Sarawak*,[6] his Lordship Tan Chiaw Thong J had this to say:

> It was alleged by the respondent that at that time the full purchase price had not been paid, and there is a balance of the purchase price owing by the applicant to the respondent. In the circumstances, I do not see how the owing of this purchase price can be said to confer a caveatable interest upon the respondent. What it has acquired on its allegation of the owing of the balance of the purchase price by the applicant is clearly, in my view, a right in personam against the applicant and not a right in rem in relation to the said land.

I have no reason to disagree with the views expressed by their Lordships in those cases in relation to the case at hand.

On the issue of the plaintiff/caveatee being a constructive trustee since the defendant/caveator has not wholly divested itself of the title over the subject land, I would say firstly that to agree with such a submission would be to ignore the obvious, that is, the indefeasibility of title as enacted in s 132 of the Sarawak Land Code (Cap 81). (See *Wong Kuan Tan v Gambut Development Sdn Bhd*[5] and *Frazer v Walker.*[7])

And on this point, the Supreme Court in the recent case of *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor*,[8] his Lordship Wan Yahya SCJ has this to say at p 304:

> In a sale of land under the Torrens system, the estate and interest in the land remains with the proprietor until he has done all that is necessary to divest the estate out of himself and vest it in the transferee ...

Further down, his Lordship continued: 'To put it shortly, completion under the Torrens system refers to that stage of the conveyance when the land is registered with the Registrar of Titles.'

In the instant case, it was not disputed that the subject land was duly registered in the name of the plaintiff/caveatee on 19 April 1990. I find no reason therefore to doubt that the defendant/caveator had in fact done all that is necessary to divest itself of the estate in the subject land and vest it in the plaintiff/caveatee. Thus, the contention of learned counsel for the defendant/caveator that the transfer was conditional upon the plaintiff/caveatee paying for the balance of the purchase price must therefore necessarily fail. Moreover, having accepted the undertaking, I do not think the defendant/caveator should now say that it has not received the balance of the purchase price. In my view, the undertaking was the substitute for the balance of the purchase price at the material time. If the defendant/caveator now wishes to realize the substitute, it is plainly entitled to do so. But it has not done so.

Secondly, there is nothing in the sale and purchase agreement providing for the existence of a trust or of similar consequences in the event of non-payment of the purchase price or any part thereof after the transfer of the subject land to the plaintiff/caveatee.

Thirdly, it is my view that the issue of a constructive trust was made on hindsight and to bolster the alleged claim of the defendant/caveator on the

subject land. I find no express averment on the issue in the statutory declaration annexed to the caveat instrument. But one thing is certain and that is the defendant/caveator wants the balance of the purchase price only. A

Fourthly, I found the circumstances upon which the subject land was transferred to the plaintiff/caveatee and the source of the present dispute did not warrant the inference of any trust, constructive or otherwise. After all the concept of constructive trusts is still uncertain and the boundaries obscure. *Snell's Principles of Equity* (28th Ed) at p 192 states: B

> No satisfactory definition of a constructive trust has yet been enunciated, and perhaps none ever will be; for the concept is still uncertain and the boundaries obscure. A possible definition is that a constructive trust is a trust which is imposed by equity in order to satisfy the demands of justice and good conscience, without reference to any express or presumed intention of the parties. 'A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee'. Yet general statements such as these leave unexplained the circumstances in which justice and good conscience require a trust to be imposed; and it may be impossible, and perhaps undesirable, to define or limit those circumstances. C D

In any event, the defendant/caveator is not without any remedy. There is still the pending civil suit which should provide it sufficient opportunity to ventilate its real claim. Further, as stated earlier on there is also the undertaking as alleged by the defendant/caveator. To date nothing has been shown that the defendant/caveator has enforced it. E

Learned counsel for the defendant/caveator also submitted that an order of this court to remove the caveat would prejudice the defendant/caveator and would also be tantamount to condoning the action of the plaintiff/caveatee in not paying the balance of the purchase price. With respect, this submission is misconceived. There is already a pending civil suit against the plaintiff/caveatee in which, to my mind, the primary object is to recover the balance of the purchase price. As I have said earlier on in this judgment, the other allegations of the rescission of the sale and purchase agreement and the prayer for an order of retransfer are nothing more than to bolster the claim of caveatable interest on the subject land by the defendant/caveator. F G

In the case of *Eng Mee Yong & Ors*,[1] Lord Diplock said this at p 218E:

> It would appear that the Federal Court took the view, which their Lordships have already held to be erroneous, that once the caveator had asserted in his affidavit that the sale agreement had not been lawfully terminated and had commenced an action for specific performance of it, the court had no option but to leave the caveat in existence until the action was tried. H

Though in the present case the situation is the converse, I am of the view that the above comment of the Privy Council is equally applicable with the same force.

Thus, I find no reason to say that the defendant/caveator will be prejudiced if an order for the removal of the caveat is granted. I

Anyway such an issue should only be considered if the defendant/caveator has satisfied [the court] in the first place that it has a caveatable

interest in the subject land. In view of my earlier finding, such an issue does not arise.

Accordingly and for the foregoing reasons, it is my finding that the defendant/caveator has not satisfied this court that it has a caveatable interest in the subject land. It follows that there is no serious question to be tried and therefore the question of balance of convenience does not arise. I therefore grant the order in terms of the said originating summons with a provision that the assessment of compensation payable should be done by the senior assistant registrar, Miri High Court.

Application allowed.

Reported by Anne Khoo